IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

TUESDAY, THE 17TH JULY 2007 / 26TH ASHADHA 1929

WP(C).No. 161 of 2007(T)

PETITIONER:

M/S.DIRECT PUBLISHERS PVT. LTD.,
TC 36/284, ANUPAMA, GREEN GARDEN,
KOTTAPPURAM ROAD, THRISSUR, REP. BY ITS DIRECTOR
MR.JEBI ISSAC.

BY ADV. SRI.R.NARENDRAN NAIR
SRI.K.T.SHYAMKUMAR
SRI.S.L.SAJI

RESPONDENTS:

1. THE PRINCIPAL GENERAL MANAGER TELECOM,
BSNL BHAVAN, UPPALAM ROAD,
STATUE, THIRUVANANTHAPURAM.

2. BHARAT SANCHAR NIGAM LTD.,
REP. BY ITS CHAIRMAN & MANAGING DIRECTOR,
NEW DELHI.

3. THE ACCOUNTS OFFICER,
OFFICE OF THE PRINCIPAL GENERAL MANAGER TELECOM,
BSNL, THIRUVANANTHAPURAM.

4. M/S.GETIT INFORMEDIARY LIMITED,
TC 40/1508(24), UNISON TOWERS,
2ND FLOOR, MANACAUD P.O., THIRUVANANTHAPURAM.

ADDITIONAL 5TH RESPONDENT:

M/S.LAKSHMI OFFSET PRINTERS,
161, SOUTH CAR STREET, SIVAKASI,
TAMIL NADU.
(ADDL.R5 IMPLEADED AS PER ORDER IN I.A.NO.2995/07
DTD.26.2.07)

BY ADV. SRI.MATHEWS K.PHILIP,SC, BSNL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 17/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P(C).No. 161/07.

APPENDIX \

PETITIONER'S EXHIBITS:

P1. COPY OF THE TOURISM DIRECTORY PUBLISHED BY THE PETITIONER FOR THE YEAR 2004.

P2. COPY OF THE TENDER NOTIFICATION DTD.30.8.06.

P3. COPY OF THE SPECIMEN TECHNICAL BID SUBMITTED BY THE PETITIONER.

P4. COPY OF THE SPECIMEN FINANCIAL BID -DO-

P5. COPY OF THE ORDER DTD.23.12.06 BY R1.

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///True copy///

P.A. to Judge.

S.SIRI JAGAN, J.

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W.P.(C).No.161 of 2007

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Dated this the 17th day of July, 2007

J U D G M E N T

By Ext.P.2 tender notice, the 1st respondent invited tenders for printing of telephone directory for the Thiruvananthapuram Secondary Switching Area (SSA) of the BSNL as mentioned in the tender notice. The petitioner also participated in the tender. However, his tender has not been considered on the ground that the petitioner does not have the eligibility as prescribed in Ext.P2 tender notice. The petitioner is challenging the eligibility condition itself. According to the petitioner, if this eligibility condition is upheld it would have the effect of promoting monopoly in the printing of telephone directory in so far as, as per the eligibility condition, only persons who have experience in printing telephone directories for the BSNL/MTNL/DOT for two consecutive years alone would be eligible for participating in the selection process. The petitioner would contend that if this is upheld nobodyelse would ever be able to get experience in printing telephone directories of BSNL, as only those who have already printed telephone directories of BSNL/MTNL/DOT alone would be qualified to participate in the tender. The petitioner therefore,

seeks quashing of the said eligibility condition and direction to the BSNL to consider the petitioner's tender also.

2. The BSNL with the help of the counter affidavit filed on behalf of respondents 1 to 3, strongly refutes the contentions of the petitioner. According to them, printing of directories of BSNL is a difficult task. Thiruvananthapuram SSA has 4.5 lakhs subscribers. For printing a telephone directory, with this much of voluminous data, requires considerable experience in executing the same work. A person, without previous experience in handling this much of data and converting them, will not be able to execute the work efficiently upto the expectation of the BSNL. Without previous experience in executing BSNL/MTNL/DOT directory work, it will not be possible to handle this much of data and finish the work within the stipulated time. Therefore, the conditions in clause 3 have to be upheld in the interest of BSNL in particular, and also in the interest of the subscribers and the public in general. The counsel for the BSNL would also contend that if there is some serious mistake in the directory, the BSNL would be held responsible and in such event, they may have to pay compensation to the aggrieved persons whose names and telephone numbers are printed in the

directory. They would strongly refute the contention of the petitioner that such eligibility condition would create monopoly in the matter of printing of telephone directories for BSNL.

3. I have considered the rival contentions in detail.

4. BSNL is an all India organization. Therefore, normally the tender conditions for printing of telephone directories also would be the same all over India. That being so, if only those persons who have printed directories for BSNL/MTNL/DOT would alone be eligible for participating in the tender process, it does not need an intellectual exercise to know that such persons having such experience will be very limited in so far as if only BSNL, MTNL or DOT gives such contract, they would have experienced persons and once a person gets the work for two consecutive years then, for ever he or the similarly situated persons alone would be eligible for participating in the subsequent tenders to the exclusion of all others. I am of opinion that this would certainly create monopoly which has been found unacceptable by the Supreme Court. In this connection, I may refer to the decision of *RASHBIHARI PANDA ETC. v. STATE OF ORISSA* reported in 1969 (1) SCC 414. In the said decision in paragraphs 17 to 19, the Supreme Court has held as follows:

"17. Validity of the schemes adopted by the Government of Orissa for sale of *Kendu* leaves must be adjusted in the light of Article 19(1)(g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase *Kendu* leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government is not of any significance. From the affidavit field by the State Government it appears that the price fetched at public auctions before and after January, 1968, were much higher than the prices at which *Kendu* leaves were offered to the old contractors. The Government realised that the scheme of offering to enter into contracts with the old licensees and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade. The Government then decided to invite offers for advance purchases of *Kendu* leaves but restricted the invitation to those individuals who had carried out the contracts in the previous year without default and to the satisfaction of the Government. By the new scheme instead of the Government making an offer, the existing contractors were given the exclusive right to make offers to purchase *Kendu* leaves. But in so far as the right to make tenders for the purchase of *Kendu* leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection. The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in *Kendu* leaves and also new entrants into that business. It was *ex facie* discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business. In our view, both the schemes evolved by the Government were violative of the fundamental right of the petitioners under Article 19(1)(g) and Article 14 because the schemes gave rise to a monopoly in the trade in *Kendu* leaves to certain traders, and singled out other traders for discriminatory treatment.

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved *i.e.*, effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is *ex facie* arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of *Kendu* leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test

> whether the entire benefit arising therefrom is to ensure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in *Kendu* leaves from carrying on their business. The scheme of selling *Kendu* leaves to selected purchasers or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in *Akadasi Padhan's case* protected by Article 19(6)(*ii):* it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in *Kendu* leaves. The High Court also did not consider whether the restrictions imposed upon persons excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19(6). The High Court examined the problem from the angle whether the action of the State Government was vitiated on account of any oblique motive, and whether it was such as a prudent person carrying on business may adopt."

I am satisfied that the principle laid down in the above decision applies to the case at hand. It is not as if the tenderers in this case would need substantial expertise as in the case of construction of dams and other civil works. Admittedly, BSNL is supplying the magnetic media which alone has to be printed by the successful tenderer. If the information contained in the magnetic media is correct, there is very little chance of any mistake creeping into it. If at all there is a chance, that itself would be only while handling the disk. For handing that disk what is relevant is not expertise in printing, but expertise in operation

of computers, which is admittedly not a condition of eligibility in the tender conditions. Since the eligibility condition that the bidders should have experience of having successfully completed printing and punishing of minimum two telephone directories, with/without Yellow Pages, preferably in consecutive years of any SSA of BSNL/MTNL/DOT is certainly a condition which would promote monopoly, the same would infringe the fundamental rights of other intending tenderers under Article 19(1)(g) of the Constitution of India. Accordingly, the eligibility condition as contained in clause 3 of Ext.P2 tender notice is quashed. It would be open to the respondents to issue fresh tenders by incorporating such eligibility conditions which would not infringe the fundamental rights of intending tenders under Article 19(1)(g) of the Constitution of India, and proceed in accordance with law.

Writ petition is disposed of as above.

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